

**FREQUENTLY ASKED QUESTIONS
KANSAS OPEN MEETING ACT (KOMA) RULES
Revision date: May 2009**

1. WHAT GROUPS ARE SUBJECT TO THE KOMA?

How do you determine if a particular group is subject to the Kansas Open Meeting Act (KOMA)?

It is a factual issue. The KOMA applies to state and local public agencies (those related to the government). It does not apply to private entities. The KOMA also applies to any subordinate group formed by such public agencies (e.g. committees, sub-committees etc.). This means that KOMA applies to state boards, commissions, committees, city councils, county boards of commissioners, township boards, rural water district boards, public library boards, etc. and most groups formed by such entities in order to assist them with public business. The KOMA not apply to private persons or meetings of private groups such as home owner's associations, church groups, private clubs, private businesses, political party caucus, etc.

Does the KOMA apply to single individuals who work for the government?

No. The KOMA does not apply to single persons. It applies to "public bodies" which requires there be at least two people.

Does the KOMA apply to staff meetings of a public agency?

No. Not unless the staff meeting also includes participation by a majority of a public body subject to the KOMA

Does the KOMA apply to judges or judicial bodies?

No.

Does the KOMA apply to the Kansas Legislature or its committees?

Yes, unless the House or Senate, or one of their committees, adopts a rule exempting a particular body from the KOMA. Thus, in order to determine if the KOMA applies, the Rules of the House or Senate (or committee in question) must be reviewed.

Does the KOMA apply to a public body acting in a quasi-judicial manner?

Not if the body is deliberating on a case/matter before it. For example, a zoning appeals board may privately discuss a case it is trying to decide.

Does the KOMA apply to hearings conducted under the rules of the Kansas Administrative Procedures Act?

No, these hearings are specifically exempted from KOMA. Although generally open, the person conducting the hearing decides when a hearing may be closed to the public.

Does the title of the gathering make any difference? E.g. "Work Session," "retreat," "Study group," "Executive board meetings" etc.

No. If the group in question is subject to the KOMA, and it holds a meeting as defined by the KOMA, the meeting must comply with the KOMA.

2. WHAT DOES BEING OPEN UNDER THE KOMA REQUIRE, WHAT IS A MEETING, AND HOW SHOULD MEETINGS BE CONDUCTED?

A. WHAT DOES "OPEN" MEAN UNDER THE KOMA?

If a group is subject to the KOMA, what does the KOMA require them to do?

If the KOMA applies to a body or group, there are two main requirements: (a) Their meetings must be open and (b) Notice of meetings must be (individually) provided to those requesting notice. All meetings subject to the KOMA must be conducted openly - that means that the public must be allowed to listen to the discussion.

Can I use cameras or tape recorders at a public meeting subject to the KOMA?

Yes. A public body subject to the KOMA cannot prohibit the use of such devices. It can, however, make their use subject to reasonable rules that are designed to prevent disruption of public meetings, safety hazards, or other legitimate concerns.

Does a group subject to the KOMA have to allow the public to speak at all meetings?

No. The KOMA does not require that the public be allowed to talk at public meetings; unless some other law requires it, whether to allow the public a chance to speak at public meetings is a policy decision.

Can a public body subject to the KOMA conduct a meeting by telephone?

Yes. As long as it complies with all the requirements of the KOMA.

Do they have to move to another place if there are too many people in a room or some people can't get into the meeting?

The KOMA does not require that public meetings be moved to larger or better locations. Unless there is evidence that the meeting is deliberately being held in a place in order to prevent public attendance, the size or location of the room is not a KOMA violation.

Can a public body take a secret binding action?

Binding action must be taken openly. That means any binding vote on a public matter needs to be made in open session. However, some actions taken by a public body (such as spending decisions) may have been previously made by delegating authority to an individual; thus, one fact issue may be when and how decisions were originally made.

B. WHEN IS A PUBLIC BODY HOLDING A MEETING?

When does a meeting subject to the KOMA take place?

A meeting of a public body subject to the KOMA has three elements; (a) An interactive discussion (NOTE: *discussion* alone triggers the KOMA, it is not necessary that action or votes be taken); (b) by and between at least a majority of the body; (c) on matters relating to the functions of that body. All three elements must be present to trigger the KOMA.

(a) Majority Rules

What is a "Majority"?

A "majority" means the next whole number greater than one-half of the total number of members. E.g. the "majority" of a five member body is 3; the "majority" of a nine member body is 5.

May members of a body avoid the KOMA by meeting in groups that are not a majority?

No, these interactions are defined as serial communications. If a majority of a body are engaged in interactive communication, even if they meet in groups that are below the number for a majority, discussing a matter that ultimately requires binding action by the body, the KOMA applies.

(b) Interactive Discussion Rules

Does a meeting have to be "prearranged" for the KOMA to apply?

No. All that is required is that the three elements of a meeting occur; (a) An interactive discussion (NOTE: *discussion* alone triggers the KOMA, it is not necessary that action or votes be taken); (b) by and between at least a majority of the body; (c) on matters relating to the functions of that body. All three elements must be present to trigger the KOMA.

Can a majority of the members of a public body informally discuss public matters outside of an open meeting?

No. Informal discussions before, after, or during recesses of a public meeting are subject to the KOMA.

Is it OK to privately discuss public matters as long as no action is taken?

Binding action or voting is not necessary; discussion is what triggers KOMA.

Can members of a public body subject to the KOMA use other people, the telephone, notes, or email to privately discuss public matters?

Not if it involves a majority of the public body. If an interactive discussion on the affairs of the body takes place, among the threshold minimum number of members, it is subject to the KOMA. It does not matter what method is used to conduct the discussion.

(c) "Matters relating to the affairs of the body" rules.

Can members privately discuss when to hold meetings?

Yes. It is not encouraged, because of the temptation to discuss other things or the appearance of impropriety, but if the only way to arrange meeting times and places is to directly contact other members of the same body, the topic alone is not considered covered by the KOMA.

Can members attend a general interest meeting of another group?

Yes, as long as they refrain from any private discussions on the affairs of their body, they may attend conferences where general topics are being presented.

3. WHEN AND HOW DOES NOTICE OF MEETINGS HAVE TO BE PROVIDED?

When does a group subject to the KOMA have to provide notice?

Notice of meetings must be provided to those requesting notice. There is no duty under KOMA to provide notice unless it has been requested.

How do I request notice of meetings subject to the KOMA?

All that has to be done is to make a request for notice of meetings; all regular and/or special meetings. The KOMA does not require that requests for notice be in writing. Oral requests are valid. However, because it often becomes harder to prove that such requests were made, we urge those who want to request such notice to put their requests in writing and keep a copy.

If I am interested in meetings on a specific topic, does the KOMA require that the public body notify me when that topic will be discussed?

Not under the KOMA. The KOMA only requires that public bodies provide the time, place and date when it holds meetings. It does not require that a public body decide, ahead of time, if a specific topic will be discussed and then provide interested persons with notice of that decision.

If I have requested notice from a group subject to the KOMA, how and when should that notice be given to me?

Notice must be made or attempted to be made to each individual person/entity requesting notice. A one time notice of regular meetings times/dates/places is sufficient *unless* there is a meeting (or meetings) held at another or different time/date/place; then additional notice is required.

Does notice of a meeting subject to the KOMA have to be given in writing?

No. Notice may be legally given verbally. However, recommend it be in writing for evidentiary purposes.

Is the KOMA violated if the public body does not post notice or publishing it in the paper?

No. The KOMA does not require notification through these methods.

How long does a public body have to continue giving notice of meetings, once it's been requested?

Notice requests may be allowed to expire at the end of the fiscal year for that body, but prior to discontinuing providing notice, the public body must let those persons know that their request is expiring so that it can be renewed if they'd like to continue getting notice.

Does a past practice of providing notice create a duty to continue providing notice?

No. Notice is only required under the KOMA if it has been requested.

4. EXECUTIVE SESSIONS; WHEN CAN A MEETING BE CLOSED AND MATTERS PRIVATELY DISCUSSED?

When can a group subject to the KOMA close its meetings?

The body may go into an executive session (after convening an open meeting), in order to privately discuss a matter, if (a) the discussion is on a topic listed in K.S.A. 75-4319 and (b) the correct procedure is followed for going into executive session.

Does a public body have a duty to close certain discussions?

Not under the KOMA. The KOMA allows executives session discussions; it does not require them.

Does the KOMA require members of a public body to refrain from publicly revealing matters that were discussed while in executive sessions?

No. Some other laws, or considerations such as fiduciary duty, personal privacy rights, or contracts, may require or influence such confidentiality. But the KOMA itself does not require that the topics listed in K.S.A. 75-4319 always be kept private.

Who can be present during an executive session discussion?

Only members of the public body holding the discussion have a right to be in executive sessions. The public body may discretionarily include anyone they believe will aid them in that discussion.

Can a member of the general public be allowed into executive session discussions in order to simply listen and make sure the KOMA is not being violated?

No. If the public body allows one "general listener" to attend, the discussion must be open to the rest of the general public.

Can a group subject to the KOMA take secret binding action while in executive session?

No. All binding action must be publicly taken. Executive sessions may only be used to discuss matters. However, a public body can reach a consensus while in executive session.

How does a public body properly go into an executive session?

First the public body must be in an open session, before going into an executive session.

Then, a motion must be made, and seconded.

The motion must contain statement of (1) Justification for closure; (2) Subject(s) to be discussed; and (3) Time and place open meeting will resume.

- . Example: "Madam Chairman, I move we recess into executive session to discuss disciplinary action against a student in order to protect the privacy of the parties involved. We will reconvene the open meeting in the conference room at 8:30 p.m."

When making a motion to go into an executive session, are justification and subject the same thing?

No. Motions for executive session should contain subject and justification statement, which are not the same thing. The subject is one of the topics listed in K.S.A. 75-4319(b). The justification is an explanation of what is to be discussed (without revealing confidential information.)

Must motions to go into executive session be recorded in the minutes of meetings?

Yes. All executive session motions must be recorded in minutes.

What topics can be discussed in an executive session?

Those topics listed in K.S.A. 75-4319(b) can be privately discussed by a public body subject to the KOMA. A copy of that statute is available on-line at www.kslegislature.org There are currently 14 topics listed. These include: (1) Personnel matters relating to non-elected personnel; (2) consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship; (3) matters relating to employer-employee negotiations whether or not in consultation with the representative or representatives of the body or agency; (4) confidential data relating to financial affairs or trade secrets of corporations, partnerships, trusts, and individual proprietorships; (5) matters relating to actions adversely or favorably affecting a person as a student, patient or resident of a public institution, except that any such person shall have the right to a

public hearing if requested by the person; (6) preliminary discussions relating to the acquisition of real property; . . . And (13) matters relating to security measures, if the discussion of such matters at an open meeting would jeopardize such security measures, that protect specific systems, facilities, or equipment.

(a) Personnel matters

Can a public body privately discuss an individual who works for the body?

Yes. If that person is an employee of that body (or an applicant for employment) K.S.A. 75-4319(b)(1) allows executive session discussions about individuals who are employed by the body holding that executive session discussion.

Can an employee who is being discussed by a public body require that they allow him or her into the executive session discussion, or require that the discussion be held openly?

Not under the KOMA. The public body gets to decide whether to close a discussion concerning a public employee, or not, and who can be present in executive session discussions.

Can a public body subject to the KOMA use an executive session to discuss independent contractors who are doing work for the public body?

No, not under the "personnel" exception; an independent contractor is not an employee.

Can a public body subject to the KOMA use executive sessions to discuss general employee related topics?

No. The personnel exception in K.S.A. 75-4319(b)(1) is intended to protect the privacy of individuals. Thus, if no individuals are being discussed, that exception to openness does not apply.

Can a public body subject to the KOMA use executive sessions to discuss applicants for employment?

Yes. The KOMA specifically allows such discussions in order to protect the privacy of a specific individual or individuals who have applied for employment.

Does the KOMA allow use of the "personnel exception" to privately discuss other board members or elected officials?

No. The personnel exception is intended to allow discussion of employees. Officials, whether elected or appointed, are not ordinarily considered employees.

Does the KOMA allow use of the "personnel exception" to privately discuss employees of some other public body or entity?

No. The KOMA allows a public body to privately discuss their own employees, not the employees of some other employer.

- (b) Consultation with an attorney for the body or agency which would be deemed privileged in the attorney-client relationship.

What constitutes a privileged relationship?

1. The body's attorney (or attorneys) must be present;
2. The communication must be privileged, and
3. No other third parties may be present unless the third party is part of the client organization or the attorney for the body.

Can a public body discuss a legal matter under this exception, even if their attorney is not with them?

No. This exception in the KOMA cannot be used to discuss legal matters, such as a letter received from an attorney, if the attorney is not present. The attorney for the body must be present somehow (by telephone is allowed) and participating in the discussion (not enough to simply have the attorney present).

Does the discussion have to be on litigation or threatened litigation?

No. The KOMA does not require that the legal matter involve litigation.

Can someone who is not a member of the client organization or the attorney(s) for that entity be included in an executive session called under this exception?

No. The presence of a third-party who is not part of the client organization or an attorney for that body will destroy the privileged nature of the communication.

What or who determines if the topic being discussed is privileged?

Confidentiality can attach to any communication between an attorney and a client wherein legal advice or assistance is sought or given, or information imparted in order to facilitate such advice or assistance. With very limited ethical exceptions, the client alone can decide whether to waive such confidentiality.

WHAT DOES THE KOMA SAY ABOUT AGENDAS AND MINUTES?

Does a group subject to the KOMA have to create an agenda for its meetings?

No. If it chooses to create an agenda, it should include all matters planned for discussion but agendas can be amended. The public body may discuss matters not on an agenda that come up at the last minute.

Does a group subject to the KOMA have to put everything that is said at meeting into their minutes?

Not under the KOMA. The KOMA does not speak to minutes or agendas, except to require that motions to go into executive session be recorded in the minutes.

Do all votes have to be recorded in minutes?

No, at least not under the KOMA. The KOMA only requires that motions to go into executive session be recorded. Recording anything else in minutes is a discretionary decision.

WHAT HAPPENS IF I THINK THE KOMA HAS BEEN VIOLATED?

Who can enforce the KOMA and go to court on alleged violations?

The KOMA can be enforced by the Attorney General, by county or district attorneys, or by private citizens.

If someone or group violates the KOMA, can they be sent to jail?

No. Violations of the KOMA are civil in nature, not criminal.

What penalties may result from a violation of the KOMA?

Up to \$500 fine per violation (per member violating it); injunction/mandamus/declaratory order; voiding illegal action (if a public prosecutor files a petition within 21 days after the alleged violation); possible grounds for ouster or recall (separately pursued actions).

Are these penalties always imposed for violation of the KOMA?

No. The courts rarely assess the fine provisions. Plus, in 1986, the Kansas Supreme Court created what are called "technical violations: "The court will not void any action and will overlook technical violations of the law if the spirit of the law has been met, there has been a good-faith effort to comply, there was substantial compliance with the KOMA, no one was prejudiced, and the public's right to know had not been effectively denied. *Stevens v. Board of Reno County Comm'rs*, 10 Kan.App.2d at 526.

If I want to make a KOMA complaint, how should I do that?

You may file a complaint with either the county or the district attorney, or the Attorney General. They have concurrent jurisdiction to investigate or bring an action. It is the policy of the attorney general's office to ask that all complaints be made in writing, together with any supporting documents. The Attorney General will refer an alleged KOMA violation by a local unit of government to the appropriate county/district attorney.

If I file a KOMA complaint with the Attorney General or a county/district attorney, do they have to bring charges or investigate the way I'd like?

No. Decisions on how or if to investigate or prosecute are discretionary on the part of the prosecutor. These prosecutors act on behalf of the general public, not as private

attorneys for the persons filing the complaint.

Can I bring my own KOMA action in court?

Yes. Any individual can file a KOMA action. If they need legal advice or assistance in doing so, they may want to contact a private attorney.

Who has the burden of proof in KOMA actions that are filed in court?

The Plaintiff has the initial burden to show a prima facie case. If they meet that burden, it then shifts to the agency or body to justify its actions.

Does the plaintiff have to prove that the violation was intentional?

No. There is no requirement of specific intent to violate the law. "Knowing" violation occurs when there is purposeful commission of the prohibited acts. *Palmgren*, 231 Kan. at 536-37.

Who pays court costs in a KOMA action?

A plaintiff may receive court costs if a violation is established. Defendant may receive costs only if action was frivolous.

Where is a KOMA law suit filed?

In the county where the action occurred. K.S.A. 75-4320a(a)